Golden Bond Sdn Bhd v Sabtra Sdn Bhd & Anor

HIGH COURT — SUIT NO T(22)-32 OF 2001
LINTON ALBERT JC
6 DECEMBER 2003

Contract — Misrepresentation — Fraudulent misrepresentation — Whether plaintiff induced into entering agreement — Whether experience and availability of legal advice should absolve liability for claim in question

The plaintiff had entered into an extraction and purchase agreement with the first defendant as a result of negotiations between one Datuk Yeo, whose sons were the owners of the plaintiff, and one John Nip who controlled the first defendant through his wife. As a consequence of the agreement, the plaintiff paid the first defendant a deposit of RM2 million. The plaintiff brought this claim for fraudulent misrepresentation against the first defendant, contending that it had been falsely misled into believing that they could extract timber from the relevant land when the facts subsequently proved otherwise.

Held, allowing the plaintiff's claim:

(1) The plaintiff has proved beyond reasonable doubt that the fraudulent misrepresentation made by John Nip had induced the plaintiff to enter into what amounted to a useless agreement (see para 7).

(2) The defendants could not be absolved from liability by claiming that Datuk Yeo was an experienced timber businessman or that he had received advice from a lawyer who had vetted the said agreement (see para 8).

(3) The plaintiff's claim to the refund of the balance of the deposit amounting to RM87,478.35 was allowed (see para 11).

(4) The defendants had the undeserved benefit of RM2 million because of the fraudulent misrepresentation of John Nip. It is for this reason that exemplary damages in the sum of RM100,000 be awarded in favour of the plaintiff (see paras 12 and 13).

[**Bahasa Malaysia summary**

Plaintif telah membuat satu perjanjian mengekstrak dan membeli kayu balak dengan defendan pertama berpunca daripada perbincangan di antara Datuk Yeo, yang mana anak-anaknya merupakan pemilik plaintif, dan John Nip yang menguruskan defendan pertama melalui isterinya. Berpunca daripada perjanjian tersebut, plaintif telah membayar defendan pertama deposit sebanyak RM2 juta. Plaintif telah memajukan tindakan ini untuk salah nyata fraud terhadap defendan pertama, sambil mengadu bahawa ia telah ditipu untuk mempercayai bahawa mereka boleh mengekstrak kayu balak daripada tanah berkenaan bilamana fakta-fakta seterusnya telah menunjukkan sebaliknya.

Diputuskan, membenarkan tuntutan plaintif:

(1) Plaintif telah membuktikan tanpa keraguan munasabah bahawa salah nyata fraud yang dibuat oleh John Nip telah mendorong plaintif untuk memasuki satu perjanjian yang tidak berguna (lihat perenggan 7).

(2) Defendan tidak boleh dibebaskan daripada liabiliti dengan mengadu bahawa Datuk Yeo merupakan seorang ahli niaga kayu balak yang berpengalaman ataupun dia telah menerima arahan daripada seorang peguam yang telah mengkaji perjanjian berkenaan (lihat perenggan 8).

(3) Tuntutan plaintif untuk pembayaran balik baki deposit berjumlah RM87,478.35 dibenarkan (lihat perenggan 11).

(4) Defendan telah mendapatkan faedah RM2 juta yang tidak sepatutnya disebabkan oleh salah nyata fraud yang dibuat oleh John Nip. Maka atas sebab inilah ganti rugi teladan sebanyak RM100,000 diberikan kepada plaintif (lihat perenggan 12 and 13).

Notes

For cases on fraudulent misrepresentation, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3856–3871

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal [1999] 2 MLJ 500 (refd)
Armagas Ltd v Mundogas SA (The 'Ocean Frost') [1985] 1 Lloyd's Rep 1 (refd)
Central Rly Co of Venezuela v Kisch [1867] LR 2 HL 99 (refd)
Eastern & Oriental Hotel (1951) Sdn Bhd v Vellarious George Fernandez & Anor [1989] 1 MLJ 35 (refd)
Panatron Pte Ltd v Lee Cheow Lee & Anor [2001] SLR 405 (refd)
Yip Shou Shan v Sin Heap Lee-Marubeni Sdn Bhd [2002] 5 CLJ 574 (refd)

Legislation referred to

Contracts Act 1950 s 18(a), 18(c)
Evidence Act 1950 s 114(g)

Nobert Yapp (Jayasuriya Kah & Co) for the plaintiff
Chin Yuen Fong (Chee & Co) for the defendant

Linton Albert JC:

[1] The Plaintiff and the first defendant are both companies engaged in the timber business. They had entered into an Extraction and Purchase Agreement dated 10 November 2000 for the sale by the First Defendant to the Plaintiff of all the commercial round timber logs to be extracted from a 5000 hectares coupe (the said area) within a concession area of 306,310 hectares situated at Gunung Rara/ Kalabakan/ Ulu Segama Forest Reserve. The Extraction and Purchase Agreement was the culmination of negotiations between one Datuk Yeo Wang Seng ('Datuk Yeo') and John

Nip Wing Hon ('John Nip') initiated by a middleman, one Chiew Kui King ('PW1'). Datuk Yeo and John Nip were unquestionably the main players and, although neither was a director of the Plaintiff and the First Defendant respectively, they had the power and authority to finalise the terms and conditions of the Extraction and Purchase Agreement. The execution of the Extraction and Purchase Agreement by the respective directors was, of course, a mere formality. The Plaintiff was owned by Datuk Yeo's two sons who were its directors. John Nip, however, controlled the First Defendant through his wife who was the majority shareholder thereof. There is no controversy as to the authority of both Datuk Yeo and John Nip to negotiate on behalf of the Plaintiff and the First Defendant respectively.

[2] Negotiations for the Extraction and Purchase Agreement began somewhere between August and October 2000 after John Nip had told PW1 at Hyatt Hotel, Kota Kinabalu, that he had an offer of a timber concession of 38,000 hectares in the Benta Wawasan concession area and inquired from PW1 whether anybody was interested. Soon thereafter, PW1 arranged for a meeting between Datuk Yeo and John Nip at John Nip's office in Tawau at which PW1 was also present. After negotiations at John Nip's office, the three of them went to the Chambers of Mr Liew Chiew Chai ('DW1'), an Advocate and Solicitor practising in Tawau, where instructions were given to DW1 who then prepared the Extraction and Purchase Agreement which is the subject matter of this suit. This is because the Plaintiff, as it turned out, was never able to extract let alone purchase a single log from the said area despite having paid the First Defendant RM2 million as a deposit as required by the Extraction and Purchase Agreement. The Plaintiff was left high and dry although eventually it managed to obtain a refund of a substantial portion of the deposit leaving a balance of RM87,478.35 not refunded which the Plaintiff is now seeking to recover with interest. It must be noted that throughout the negotiations one K.C. Transport Sdn Bhd ('KCT') featured prominently as the beneficiary of the 38,000 hectares concession John Nip alleged he had at his disposal but at the insistence of John Nip and the concurrence of Datuk Yeo and DW1, the First Defendant was made a party to the Extraction and Purchase Agreement in substitution for KCT, on the basis, as explained by John Nip, that the First Defendant was the marketing agent and sister company of KCT which was also controlled by John Nip through his wife and her siblings who were the shareholders and directors of KCT.

[3] The reliefs claimed by the Plaintiff against the Defendants are based on fraudulent misrepresentation, the alleged particulars of which are as stated in paragraph 10 of the Plaintiff's statement of claim which I find useful to reproduce. It is as follows:

(i) Contrary to what was represented by the second Defendant to the Plaintiffs' Agent, neither K.C. Transport Sdn Bhd nor the First Defendant had secured the rights over a timber concession area measuring 38,000 hectares located in the Kalabakan Forest Reserve in the State of Sabah.

(ii) In actual fact and unknown to the Plaintiffs at the material time, under the 'Relogging and Timber Sale Agreement' dated 22 December 1999 entered

into between the First Defendants and Sabah Softwoods Sdn Bhd the First Defendants' entitlement only covers an area of 1,560 hectares.

(iii) Preamble (2) of the Extraction and Purchase Agreement states that the First Defendant had entered into an agreement with Sabah Softwoods Sdn Bhd for the extraction and purchase of the commercial round timber logs from one of the coupes of 5,000 hectaares when in actual fact the agreement only covers an area of1,560 hectares.

(iv) The First Defendants did not allow the Plaintiffs to commence extraction immediately nor was the Plaintiffs given possession of the area contracted despite payment of the deposit of RM2 million by the Plaintiffs.

[4] I am mindful of the fact that in order to succeed, a higher burden of proof is placed upon the Plaintiff than would ordinarily be the case in civil proceedings. Indeed the authorities seem to suggest that proof beyond reasonable doubt is required (see *Eastern & Oriental Hotel (1951) Sdn Bhd v Vellarious George Fernandez & Anor* [1989] 1 MLJ 35). It is on that basis that I will proceed to consider and evaluate the evidence before me, both oral and documentary, but first it may be useful to set out the relevant provisions of the Contracts Act 1950 ('the Act') where 'misrepresentation' is defined. They are found in s 18(a) and (c) of the Act and are as follows:

a. the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; and

c. causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement

[5] Learned Counsel for the Plaintiff insisted that it was the repeated assertion of John Nip that he had the benefit of 38,000 acres of timber concession area through KCT that had induced Datuk Yeo to agree to the execution of the Extraction and Purchase Agreement between the Plaintiff and the First Defendant. Mr Chin Yuen Fong, Learned Counsel for the Defendants, disagreed, contending that Datuk Yeo knew all along that John Nip was referring to the concession obtained by one Rakyat Berjaya Sdn Bhd ('RBJ') and granted to KCT under the Relogging and Timber Sale Agreement ('the RBJ Agreement') dated 3 November 2000, entered into between KCT and RBJ. It was also alleged by the Plaintiff that John Nip had shown an agreement ('the SSF Agreement') dated 22 December 1999 between the First Defendant and Sabah Softwoods Sdn Bhd whereby the First Defendant was granted rights over a concession area within the Benta Wawasan Concession Area but reference to the acreage granted to the First Defendant in the SSF Agreement was inexplicably blotted out. This was, of course, strenuously denied by the Defendants. Recourse to the observation made in *Armagas Ltd v Mundogas SA (The 'Ocean Frost')* [1985] 1 Lloyd's Rep 1 would, in my view, be of assistance, in getting to the truth and it is reproduced as follows:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a a judge in ascertaining the truth.

[6] I have no hesitation in finding that the truth lies in the version presented by the Plaintiff. Despite several inconsistencies in his testimony which Learned Counsel for the Defendants not unnaturally made a meal of, I find Datuk Yeo a reliable and truthful witness. I am, on the other hand, totally unimpressed by the twists and turns which characterised John Nip's conduct, not least of all was his ability to hoodwink not only a trusting and gullible Datuk Yeo but also his hapless solicitor DW1, whose apprehension about the inadequacy of the SSF Agreement as a basis for the Extraction and Purchase Agreement was brushed aside by a slick and confident John Nip who promised to show DW1 the 'confidential and sensitive' document the First Defendant was purported to derive its right to award the 5,000 hectares to the Plaintiff under the Extraction and Timber Sale Agreement. Not surprisingly, and true to his character, John Nip never showed DW1 the document as promised as it was never in existence. Lest aspersions be cast on DW1, I must state categorically that DW1 was in the circumstances above board, confronted as he was by two eager clients, one genuine and trusting, the other impatient to lay his hands on the RM2 million deposit, half of which was forthcoming upon execution of the Extraction and Purchase Agreement. As it turned out, even the RBJ Agreement upon which the Defendants rely heavily, does not, in my view, make the misrepresentation by John Nip any less fraudulent. The size of the area referred to in the RBJ Agreement was 4,678 hectares not 5,000 as stated in the Extraction and Purchase Agreement. The authority or lack of it, of the First Defendant to enter into the Extraction and Purchase Agreement as the 'marketing agent' of KCT is conspicuous by the total absence of any evidence to support this allegation. Even worse, the SSF Agreement which refers only to an area of 1560 hectares, incidentally was totally devoid of commercial timber just weeks after the Extraction and Purchase Agreement was executed. Not insignificant is the fact that John Nip was very difficult to get in touch with after the RM2 million deposit had been fully paid in December 2000, something which even his solicitor, DW1 complained about in cross-examination. So also is the quick response of the First Defendant to the letter from the Plaintiff dated 5 January 2001 seeking refund of the RM2 million deposit, when the First Defendant by its letter dated 17 January, 2001 promptly terminated the Extraction and Purchase Agreement with a promise to refund the full amount of the deposit, ostensibly to avoid liability.

[7] In the light of the matters set out above, it is my finding that the Plaintiff has proved beyond reasonable doubt its contention that the fraudulent misrepresentation made by John Nip induced the Plaintiff to enter into what amounted to a useless agreement. It is clear beyond reasonable doubt, that the Plaintiff has satisfied the essential ingredients of fraudulent misrepresentation as set out in *Panatron Pte Ltd v Lee Cheow Lee & Anor* [2001] SLR 405 at p 408, which is as follows:

> The law as regards fraudulent representation is clear. Since the case of *Pasley v. Freeman* (1789) 3 Term Rep 51, it has been settled that a person can be held liable in tort to another, if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon, and that other does act

upon it and suffers damage. This came to be known as the tort of deceit. In *Derry v Peek* (1889) 14 App Cas 337 the tort was further developed. It was held that in an action of deceit the plaintiff must prove actual fraud. This fraud is proved only when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

The essentials of this tort have been set out by Lord Maugham in *Bradford Building Society v Borders* [1941] 2 All ER 205. Basically these are the following essential elements. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statement. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be willfully false, or at least made in the absence of any genuine belief that it is true.

[8] I will next turn to consider the arguments put forward on behalf of the Defendants. Learned Counsel, Chin Yuen Fong, argued that the Defendants ought to be absolved from liability on the grounds that Datuk Yeo had the benefit of advice from one, Tan Tui Song, a lawyer from Kuala Lumpur who had vetted the Extraction and Purchase Agreement before its execution and s 114(g) of the Evidence Act 1950 ought to be invoked by reason of the Plaintiff's failure to call Tan Tui Song who was present throughout the whole proceedings. I do not find these grounds to be of any consequence, nor is the fact that Datuk Yeo was an experienced timber businessman who ought to have had the prudence to avoid the situation he found himself in. The short answer to these contentions can be found in two cases cited by learned counsel for the plaintiff. In *Panatron Pte Ltd v Lee Cheow Lee & Anor* [2001] SLR 405, this is what was stated by LP Thean JA at p 411:

It is argued on behalf of the appellants that Lee and Yin should nevertheless be denied success, because they failed to exercise reasonable diligence to discover the falsity of the statements, something they should have done, being knowledgeable and experienced businessmen. However, the law is clear. All that is required is reliance in the sense that the victims were induced by the representations. Once this is proved, it is no defence that they acted incautiously and failed to take those steps to verify the truth of the representations which a prudent man would have taken: *Central Rly Co of Venezuela v Kisch* [1867] LR 2 HL 99.

[9] The headnote in the case of *Central Rly Co of Venezuela v Kisch* [1867] LR 2 HL 99 states as follows:

Where there has been fraudulent misrepresentation, or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry.

[10] Finally, I must consider the reliefs sought by the Plaintiff. Relying on *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500, Learned Counsel for the Plaintiff, Mr Nobert Yapp abandoned prayers 2 and 3 of the Plaintiff's statement of claim and rightly so, I might add, as there is precious little evidence before me upon which damages on loss of profits can realistically be assessed.

[11] I do not, however, find any difficulty in allowing the Plaintiff's claim to the refund of the balance of the deposit amounting to RM87,478.35 which the Defendants have unabashedly admitted to have retained. It was contended for the Defendants that Datuk Yeo had agreed with John Nip that an alleged debt owed by one Aturmaju Sdn Bhd which is connected to Datuk Yeo would be settled. It is beyond me how such a preposterous proposition can be sustained. There was no mention of such a debt let alone the alleged agreement to settle it in the letter dated 17 January, 2001 from the First Defendant to the Plaintiff. The inevitable conclusion is that these allegations were mere concoctions unsupported by credible evidence.

[12] I am of the view that it would be petty to award interest on the RM2 million for the short duration it was in the hands of the Defendants and I, therefore, decline to do so. On the other hand, I must not be oblivious to the fact that the Defendants had the undeserved benefit of RM2 million because of the fraudulent misrepresentation of John Nip in inducing the Plaintiff to enter into a useless agreement. It is for this reason that exemplary damages ought in the circumstances be awarded in favor of the Plaintiff. I am guided on this by the principles set out by Mohd Noor Ahmad J in *Yip Shou Shan v Sin Heap Lee-Marubeni Sdn Bhd* [2002] 5 MLJ 113 at pp126-127:

> In respect of exemplary damages, the award is restricted to three categories, namely:
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> (a) oppressive, arbitrary or unconstitutional conduct by government servants;
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> (b) conduct calculated to result in profit to the defendant; and
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> (c) where expressedly authorised by statute
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> (see *Rookes v Barnard* [1964] AC 1129)
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> In the present case, only category (b) is relevant. In *Rookes* case, Lord Devlin states as follows:
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> 'Where a Defendant with a cynical disregard for the plaintiff's right has calculated that the money be made out of his wrongdoings will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object – perhaps some property which he covets – which he either could not obtain at all or not obtain except at a price greater than he wants to put down.'
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> And in *Cheng Hang Guan v Perumahan Falim (Penang) Sdn Bhd* supra @ 63, Edgar Joseph Jr SCJ referred to the expression 'calculated to make a profit' thus:
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> 'In *Cassel & Co v Broome* [1972] 1 All ER 801, Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard.* This is how he put it at p 843. There may be exemplary damages if a defendant has formed and be guided by the view that though he may have to pay some damages or compensation because of what he intends to do, yet he will in some at gain (for the category is not confined to money making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation

> contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactory for him.

A tortfeasor should not be allowed to obtain a benefit or pecuniary advantage from his wrongdoings (re *McGregor On Damages* (15th Edn) para 456). The three criteria for the calculation of exemplary damages are:

(a) the plaintiff must be the victim of the punishable behaviour,

(b) there must be moderation in the award so as not be amount to a greater punishment than would be likely to be incurred if the conduct was criminal, and

(c) the financial means of the parties.

[re Lord Devlin in *Rookes v Barnard* supra]

However, the conduct of the parties must remain a relevant consideration in the calculation, and on this, *Mc Gregor On Damages* para 465 states:

> 'Then the Court may take into account, according to the decision in *Praaed v Graham*, the conduct of the defendant right down to the time of judgment ... An apology by the defendant in the witness box would make a difference in his favour, according to Singleton LJ in *Loudon v Ryder*, while persistence in the charge might increase exemplary damages.'

And in considering the means of the parties, the size of the award must be sufficient to punish the wrongdoer as the gist of exemplary award is punitive (re *McGregor On Damages* para 465).

[13] In the light of the matters set out above, I am of the view that a sum of RM 100,000 representing a sum equivalent to 5% of the RM2 million is an appropriate measure of exemplary damages which ought to be awarded.

[14] Therefore, judgment is entered against the defendants as follows:

1. The sum of RM87,478.35 with interest thereon at the rate of 8% per annum from the date of judgment until full payment;

2. RM100,000 with interest at the rate of 8% per annum from the date of the Extraction and Purchase Agreement until full payment as exemplary damages; and

3. Costs to be taxed unless agreed.

Plaintiff's claim allowed with costs.

Reported by AG Kalidas